Supreme Court, U.S.
FILED
JAN 4 2001
CLERK

(2)

No. 00-770

IN THE

Supreme Court of the United States

KAISER ALUMINUM AND CHEMICAL CORPORATION,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF OF KAISER ALUMINUM AND CHEMICAL CORPORATION ON PETITION FOR WRIT OF CERTIORARI

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

17 pp

On November 13, 2000, Kaiser Aluminum and Chemical Corporation filed in this docket its Petition for Writ of Certiorari ("Petition") to the United States Court of Appeals for the Fifth Circuit.

Kaiser now makes this supplemental filing, pursuant to the Court's Rule 15(8), for the sole purpose of advising the Court of a settlement of related issues ('Settlement") between Kaiser and the Mine Safety and Health Administration of the United States Department of Labor ("MSHA"). The Settlement, which reserves and does not address the issues raised in Kaiser's Petition, was approved by an administrative law judge of the Federal Mine Safety and Health Review Commission on December 13, 2000. The terms of the settlement are set out in full in the Secretary of Labor's Revised Motion to Approve Settlement and Motion to Dismiss, dated December 8, 2000, filed with the Federal Mine Safety and Health Review Commission (attached hereto in the Appendix).

The information contained in Kaiser's original Corporate Disclosure Statement is unchanged.

Background

As stated in Kaiser's Petition, this case was begun in the district court when Kaiser and certain Kaiser employees challenged the jurisdiction of MSHA to issue subpoenas and to investigate the causes of an explosion at Kaiser's alumina refinery. MSHA's investigation was to determine whether there were civil or criminal violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 *et seq* (the "Mine Act"), the statute that creates and defines MSHA's jurisdiction and powers. In challenging the investigation and the subpoenas, Kaiser and the Kaiser employees challenged MSHA's jurisdiction over Kaiser and its employees. Kaiser also sought to protect certain documents from discovery on the ground that they are work product and that they are protected by the common law self-critical analysis privilege.

The Fifth Circuit Court of Appeals affirmed the conclusions of the district court (1) that Kaiser's refinery is a "mine" within the meaning of the Mine Act, (2) that MSHA may therefore exercise its Mine Act investigatory and subpoena powers against Kaiser and Kaiser's employees, and (3) that the documents in question are discoverable by MSHA and not privileged or protected.

After the issuance of the District Court's order, the investigation continued. MSHA ultimately issued citations and assessed civil penalties against Kaiser and certain Kaiser employees for alleged violations of the Mine Act. Kaiser and the employees then initiated administrative proceedings to formally contest the citations and the penalties before the Federal Mine Safety and Health Review Commission pursuant to 30 U.S.C. § 815(d). The Settlement resolves those contest proceedings, except for the issues before this Court.

The Terms of the Settlement

In order to resolve the contest proceedings, Kaiser and two individual employees have agreed to pay monetary penalties, and Kaiser has agreed to undertake a program of future actions. The Settlement does not resolve the jurisdictional and privilege issues raised in Kaiser's Petition, and it expressly reserves them. Under the Settlement, resolution of those issues will depend on the disposition by this Court of Kaiser's Petition. The Settlement is thus subject to any decision on the merits by this Court.

Thus the Settlement provides in part:

> 6 . . . . This agreement is entered into by both parties in lieu of continued litigation under the Mine Act, *other than the issues raised in Kaiser's pending Petition for Certiorari* . . . . The parties have taken different positions regarding the validity of the citations and orders and the appropriate level of negligence. . . . Kaiser does not admit . . . the validity of the citations

> and orders . . . . Kaiser and the Secretary are entering this agreement without prejudice to their rights to make future arguments or raise any defenses in any other cases, *including the pending Petition for Certiorari . . .*, and . . . Kaiser and the Secretary retain their right to assert in any subsequent action that conditions or practices cited in the original citations, or the amended citations or orders, may or may not be violations of standards or provisions of the Mine Act.
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> . . . .
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> 8 . . . . This settlement agreement is acknowledged by the parties to be a global and final resolution of all outstanding and potential matters resulting from or related to the July 5, 1990 event and the Secretary's investigation thereof, *except for the issues raised in Kaiser's pending Petition for Certiorari . . . .* [Emphasis supplied].

The Live Issues Before This Court

The issues raised in Kaiser's Petition remain "live." Both parties retain a "legally cognizable interest in the outcome," and there is every reason to expect that "the wrong will be repeated." *Erie v. Pap's A.M.*, 529 U.S. 277, ____, 120 S.Ct. 1382, 1390 (2000), and cases cited.

1. As indicated above, the Settlement reserves and does not address the issues pending before this Court. Neither Kaiser nor MSHA have, by the Settlement, modified or resolved their differences on any of the issues set out in Kaiser's Petition. MSHA's ability to enforce the Settlement, including the program of future actions to be undertaken by Kaiser, will necessarily be subject to any determination by this Court of MSHA's jurisdiction over Kaiser.

2. MSHA continues to assert that Kaiser's facility is a "mine" subject to MSHA's jurisdiction under the Mine Act, and Kaiser continues to assert the contrary.

There is a continuing live dispute between the parties over whether MSHA has statutory jurisdiction to regulate and investigate Kaiser, its facilities, and its employees.

3. MSHA asserts a continuing right to investigate any condition in Kaiser's refinery that it believes may be a violation of the Mine Act. By their nature, MSHA's investigations under the Mine Act are normally of brief duration and will typically be concluded in a matter of weeks, days, or even hours. MSHA's wrongful assertion of a power to investigate Kaiser is thus a wrong which is capable of constant and continuing repetition but evading review.

4. MSHA asserts that Kaiser has a continuing obligation, under pain of civil and criminal penalties, to comply with all provisions of the Mine Act and with numerous mandatory regulations issued by MSHA, including continuing record-keeping, training, and reporting obligations, as set out in Title 30 of the Code of Federal Regulations. Kaiser contends that it has no such continuing obligation because Kaiser's refinery is not a mine.

5. The erroneous decision of the Fifth Circuit, entered without regard to this Court's recent controlling precedent, if not vacated, will have preclusive *res judicata* effect against Kaiser in future disputes over MSHA's jurisdiction.

6. MSHA is aware that a decision by this Court will determine its jurisdiction to regulate, not only Kaiser's alumina refinery, but also the alumina refineries of other companies. Thus, for example, a proceeding now pending before the Federal Mine Safety and Health Review Commission, involving citations for alleged violations of the Mine Act at the

facility of another alumina refiner, has been stayed pending this Court's disposition of Kaiser's Petition.[1]

7. As a result of the district court's order enforcing the subpoena, documents for which Kaiser claims protection were involuntarily turned over to MSHA. However, in receiving the documents, MSHA agreed informally that the documents would not be disclosed or made available to third parties until a final judicial resolution has been reached on Kaiser's claim that the documents are protected. If the Fifth Circuit's decision is vacated and reversed, Kaiser will be free to seek the return of the documents from MSHA.

8. If the Fifth Circuit's erroneous determination on the privilege issues is not reversed or vacated, that decision will have preclusive effect against Kaiser in civil litigation arising out of the explosion. Also, private litigants may seek the documents from MSHA under the Freedom of Information Act, 5 U.S.C. §552, or otherwise.

9. In the exercise of its investigative powers, MSHA asserts a continuing right to subpoena documents, from Kaiser and other entities, of the type Kaiser seeks to protect. MSHA like Kaiser, has a live interest in the collateral effects of the Fifth Circuit's decision on the privilege issues.

WHEREFORE, Kaiser respectfully advises the Court of the Settlement and advises the Court that the issues raised in Kaiser's petition remain live and continue to require review by this Court.

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[1] *Secretary of Labor v. Reintjes of the South, Inc.*, Docket Nos. Cent 99-152-RM, *et al.*

Respectfully submitted,

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